IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

CONGRESSIONAL REAPPORTIONMENT COMMISSION,
Appellant,
v.
SABO BULTEDAOB, JOHHNY TUDONG; NESTRALDA MECHAET, MEISAI CHIN, KALISTUS ILUCHES, and SALVADOR TELLAMES,
Appellees.

Cite as: 2016 Palau 26
Civil Appeal No. 16-018
Appeal from Civil Action No. 16-060

Decided: November 25, 2016

Counsel for Appellant.....A. Trout
Counsel for Appellees.....J. Toribiong

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
LOURDES F. MATERNE, Associate Justice
KATHERINE A. MARAMAN, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Associate Justice, presiding.

OPINION

PER CURIAM:

[¶ 1] On October 17, 2016, this Court issued an order reinstating the Congressional Reapportionment Commission's ("CRC") "2016 Reapportionment and Redistricting Plan" (the "2016 Plan"). The order was issued without a full opinion in the interest of providing sufficient time to print ballots for the upcoming election. This opinion provides additional explanation of the basis for that order.

DISCUSSION[1]

[¶ 2] Article IX, section 4(a) of the Constitution provides that every eight years, the CRC "shall publish a reapportionment or redistricting plan for the Senate based on population, which shall become law upon publication." Section 4(c) further provides that if any voter timely challenges the plan via petition, "the Supreme Court shall have original jurisdiction to review the plan and to amend it to comply with the requirements of this Constitution." This case arises out of a timely voter petition challenging the CRC's 2016 Plan.[2]

[¶ 3] The CRC's 2016 Plan provided: "The Senate shall be composed of thirteen (13) members to be popularly elected in a Single Senatorial District." This plan was identical to the plan promulgated by the CRC in 2008. The petitioning voters argued that a plan that makes no changes to the apportionment and districts in the previous plan is not a "reapportionment or redistricting plan" as that phrase is used in the Constitution.

[¶ 4] The Trial Division concluded that the 2016 Plan did not comply with the requirements of section 4(a). That conclusion relied on dictum from our decision in *Tellames v. CRC*, 8 ROP Intrm. 142 (2000). In *Tellames*, we described section 4(a) "as an affirmative command that the Commission revise at least one aspect of the districting scheme." *Id.* at 146. Because the CRC had not revised at least one aspect of the 2008 Plan, the Trial Division

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[1] A fuller procedural history of this case is laid out in our Order of October 17, 2016.

[2] The Trial Division observed that section 4(c) does not reference a specific Division of the Supreme Court to review the plan. Trial Decision at 3. Statute, however, provides that "[a]ny registered voter may petition . . . the Trial Division of the Supreme Court to review the plan." 23 PNC § 209. Statute further provides that the Trial Division's "decision on the plan shall be reviewable by the Appellate Division." *Id*. The Supreme Court has not promulgated any alternative procedure pursuant to the Court's rule-making authority under Article X, section 14 of the Constitution. As the trial court recognized, the "longstanding practice" of apportionment challenges has followed the procedure outlined in 23 PNC § 209. The appellant has not raised the issue of how to proceed on appeal so we do not address it.

concluded that the 2016 Plan did not comply with the Constitution. The Trial Division accordingly changed one aspect of the plan. Looking to data that the resident citizen population had decreased by around 12%, the court decreased the number of Senators to be elected by around 12%, from 13 to 11 Senators. The amended 2016 Plan thus provided: "The Senate shall be composed of eleven (11) members to be popularly elected in a Single Senatorial District."

[¶ 5] As explained below, we conclude that nothing in the Constitution requires the CRC to make an arbitrary change to the Senate plan every eight years. The only remaining question is whether the 2016 Plan otherwise complies with the Constitution. We conclude that it does.

I. Districting and Apportionment: "One Person, One Vote"

[¶ 6] The Constitution provides that the CRC "shall publish a reapportionment or redistricting plan for the Senate based on population." Palau Const., art. IX, § 4(a). In our opinion in *Tellames* we described this provision as an affirmative command that the CRC "revise at least one aspect of the districting scheme." 8 ROP Intrm. at 146.[3] This statement from *Tellames* suggests a construction of section 4(a) that creates a constitutional rule compelling the CRC to make at least one change to the Senate plan every eight years even if population changes do not warrant revising the plan.

[¶ 7] The fundamental problem with such a construction is that it may defeat the primary intent of the Constitution's redistricting provision. The

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[3] The Trial Division observed that the statement in *Tellames* was dictum. The court relied on that dictum on the basis that it owed "substantial deference" to the Appellate Division's reasoning. *See* Trial Decision at 15. We have stated that our "observations in dicta have little precedential value." *Yano v. ROP*, 21 ROP 90, 94 (2014). We do not suggest that considered reasoning of the Appellate Division should be wholly disregarded. But the statement in *Tellames* was an aside, rejecting an argument not properly before the Court. The reasoning in the Trial Division's decision below provided sufficient basis to disregard it. The Trial Division need not proceed as if any observation of the Appellate Division in dicta is infallible. To paraphrase an aphorism, we are not the court of last resort because we are infallible; we are infallible only because we are the court of last resort. *Cf. Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

intent of this provision is not to mandate reapportionment or redistricting for its own sake. The intent of this provision is to ensure the preservation of the "one person, one vote" principle. *See, e.g.*, *Yano v. Kadoi*, 3 ROP Intrm. 174, 183 (1992); *see also, e.g.*, *Eriich v. Reapportionment Comm'n*, 1 ROP Intrm. 134, 140-41 (Tr. Div. 1984), *aff'd in part and amended in part*, 1 ROP Intrm. 150 (App. Div. 1984).

[¶ 8] Reapportionment and redistricting are *means* to carry out that intent. Such means are necessary to account for population shifts over time. A Senate districting plan adopted under one set of population conditions may comport with the equal protection principle of "one person, one vote." But if population conditions change—if, for example, a substantial portion of the population moves from one district to another—the legacy Senate plan may no longer comport with Constitutional requirements. *See, e.g.*, *Eriich*, 1 ROP Intrm. at 140-41. Revising that plan through reapportionment or redistricting "based on population" can account for these population shifts and restore Senate representation closer to the ideal of "one person, one vote."

[¶ 9] If the population has not meaningfully shifted however, a reapportionment or redistricting is not necessary to preserve the "one person, one vote" principle. A compelled reapportionment or redistricting where one is not necessary may result in a Senate plan that moves away from the "one person, one vote" ideal.[4] Such a result defeats the primary intent of the Constitution's redistricting provision, and therefore any construction of that provision requiring an arbitrary change every eight years cannot stand.[5] The Constitution does not require the CRC to make an arbitrary change in the Senate plan every eight years; the Constitution requires the CRC to promulgate a Senate plan "based on population." *See* Palau Const., art. IX, § 4(a).

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[4] As the Trial Division noted, "to the extent the former reapportionment plan . . . is concededly still appropriate based on the current population, *any* amendment to the [2016] Plan poses" a "risk [of] running afoul of the constitutional mandate." Trial Decision at 13 n.8.

[5] To the extent we suggested otherwise in *Tellames*, we expressly reject that suggestion now.

II. Constitutional Compliance: "Based on Population"

[¶ 10] The petitioning voters' only challenge to the 2016 Plan was that the CRC had not changed at least one aspect of the 2008 Plan. That challenge fails for the reasons just discussed. The remaining question is whether it is necessary to amend the 2016 Plan to comply with the Constitution, specifically the requirement that the plan be "based on population." *See* Palau Const., art. IX, §§ 4(a), (c). We conclude that no amendment is required.

[¶ 11] The Trial Division amended the 2016 Plan by reducing the number of Senators by around 12%—from 13 Senators to 11 Senators—because data indicated that the resident citizen population decreased by around 12%. However, the Trial Division only did so because it incorrectly concluded that some "arbitrary change" to the 2008 Plan was required for the 2016 Plan to be constitutional. *See* Trial Decision at 15. The Trial Division did not conclude that the Constitution requires a percentage decrease in Senators equal to the percentage decrease in resident citizen population. We likewise reject such a conclusion.

[¶ 12] An argument that the number of Senators must change in lock-step with changes in resident citizen population does not find obvious support in the text of the Constitution. Article IX, section 3, for example, provides only that "[t]he Senate shall be composed of the number of senators prescribed from time to time by the reapportionment commission as provided by law." The argument also requires an untenable assumption. The argument that a plan "based on population" must decrease the number of Senators by 12% from the 2008 Plan assumes that the number of Senators in 2008—13—was a number required by the Constitution for the population in 2008.

[¶ 13] The problem with that assumption is that the Constitution does not mandate a specific citizen-to-Senator ratio. When there are multiple Senate districts, the Constitution does mandate that the ratios of each district not deviate too far from one another. *See, e.g.*, *Yano*, 3 ROP Intrm. at 181-183 (excessive deviation violates the "one person, one vote" principle). But in a plan with a single Senate district, there is no other district to deviate from. The text of the Constitution is silent as to what the ratio for such a district should be.

[¶ 14] We have previously explained the Framer's intent to afford the CRC "broad discretion in devising election schemes." *See Tellames*, 8 ROP Intrm. at 145 n.7. The CRC's decision to adopt a 13-Senator plan in 2008 was a reasonable exercise of this discretion; there is no obvious reason, however, why the CRC could not have reasonably adopted, for example, a 15-Senator plan in 2008. If it had, a 12% decrease would result in 13 Senators, the number under challenge here. The only reason a 12% decrease would result in 11 Senators here is because the CRC adopted a 13-Senator plan in 2008.

[¶ 15] Holding that the Constitution *requires* a percentage decrease in resident citizen population to be mirrored by an equal percentage decrease in the number of Senators would create a mechanical Constitutional rule to apply to a past exercise of the CRC's discretion. The language of our Constitution does not support such a contingent mechanical rule. "Constitutional language must be understood as expressive of general ideas rather than narrow distinctions, and no forced, strained, unnatural, or narrow construction should ever be placed upon it." *Tellames*, 8 ROP Intrm. at 144 (citations omitted).

CONCLUSION

[¶ 16] The CRC's constitutional mandate is to publish a "plan for the Senate based on population." Palau Const., art. IX, § 4(a). On June 27, 2016, the CRC published its 2016 Plan. The plan was accompanied by a report describing the process the CRC used to develop the plan (the "CRC Report"). The CRC Report noted that data showed around a 12% decrease in "resident-citizen population" that the Commission attributed "mainly to outmigration to the U.S." *See* CRC Report at 5. The CRC Report later stated that "the citizens' population has remained relatively constant for the past decade." *See* CRC Report at 6. After considering a number of factors, including "the latest population trend," the CRC concluded "that there is no compelling reason to alter the present makeup of the Senate." *See* CRC Report at 7.

[¶ 17] In other words, the CRC found the citizen population had remained relatively constant, and decided to keep the Senate plan constant. No language in the Constitution explicitly forecloses such a decision and we see no reason here to disturb it. Accordingly, the Trial Division's decision granting the petition challenging the 2016 Plan is **REVERSED** and its order

amending the 2016 Plan is **VACATED**. The 2016 Plan thus stands as published by the CRC: "The Senate shall be composed of thirteen (13) members to be popularly elected in a Single Senatorial District."

SO ORDERED, this 25th day of November, 2016.